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Wheelage and the Haulage Trespass: Compensating the Landowner for the Injury Sustained or the Benefit Derived from the Unauthorized Surface Use

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Wheelage And The Haulage Trespass: Compensating The Landowner For The Injury Sustained Or The Benefit Derived From The Unauthorized Surface Use

INTRODUCTION

Property located in a coal mining area has the potential to produce income from two distinct sources. The first is derived from the mining and sale of coal found on the property itself; the second from payment for the use of its surface to haul coal mined from other property to a central processing area or a public road. The origin of the practice of contracting for surface use is unclear, but reference to such agreements can be found in caselaw dating back to the mid-nineteenth century.[1] Although known by various titles such as way-leave[2] or haulage royalty,[3] wheelage is the generic name given to payment for use of roadways.[4] Today, as it was in England over a century ago,[5] wheelage is calculated at a fixed sum for each ton of coal transported over the property.[6]

Although the Kentucky Supreme Court has previously acknowledged the use of wheelage agreements in mining areas,[7] today the Court steadfastly refuses to permit recovery based on customary wheelage rates for unauthorized road use under either trespass[8] or unjust enrichment.[9] The purpose of this note is to assess the court's position under the existing law. Because tres-

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[1] Martin v. Porter, 5 M. & W. 352 (1839).

[2] Jegon v. Vivian, L.R. 6 Ch. 742 (1871).

[3] Quality Excelsior Coal Co. v. Reeves, 177 S.W.2d 728, 732 (Ark. 1944).

[4] *See, e.g.*, Middle States Coal Co. v. Hicks, 608 S.W.2d 56, 57 (Ky. Ct. App. 1980).

[5] *Martin*, 5 M. & W. 352.

[6] *See, e.g.*, *Middle States Coal Co.*, 608 S.W.2d at 56-57.

[7] Kentucky Mountain Coal Co. v. Hacker, 412 S.W.2d 581, 582 (Ky. 1967).

[8] *Id.* at 583; *Middle States Coal Co.*, 608 S.W.2d at 57; Triple Elkhorn Mining Co. v. Anderson, 646 S.W.2d 725, 726 (Ky. 1983).

[9] *Triple Elkhorn*, 646 S.W.2d at 725.

pass and unjust enrichment are distinct legal theories, this note is divided into two sections, related to each other only in the sense that the theory discussed in each has been offered to support a claim for wheelage as compensation for a haulage trespass. The conclusion reached in the first section is that since wheelage represents the only accurate measure of rental value for this unique form of trespass, its use as a measure of damage in trespass is not only permissible, but advisable. The second section concludes that, because the tortfeasor has benefitted from the trespass, the landowner should be able to recover, under unjust enrichment, the value of that benefit, measured by the wheelage the wrongdoer would have paid had he or she lawfully contracted for the privilege of using the property.

I. WHEELAGE AND USE VALUE IN TRESPASS

The general rule is that "any unauthorized entry upon the land of another is a trespass,"[10] and every trespass "results in some damage."[11] Under Kentucky law, however, not all transportation of coal from other property is unauthorized and therefore a trespass. In the case of subterranean use, "[s]o long as there is any of the immediate mineral in place . . . "[12] the mineral owner or lessee can, absent contract restrictions, use tunnels and passageways made in the extraction of the mineral for transporting minerals taken from other mining operations.[13] The reason stated for this rule is that "[n]o right of the owner of the surface is interfered with in the slightest degree."[14] On the other hand, a right to use the surface for the transportation of other coal will not be implied in a lease.[15] Thus, any surface use for such haulage without the express consent of the owner will constitute a trespass.[16]

On the issue of damages for trespass, the standard used in Kentucky distinguishes between compensation for permanent and

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[10] Hughett v. Caldwell County, 230 S.W.2d 92 (Ky. 1950).

[11] *Id.*

[12] Middleton v. Harlan-Wallins Coal Corp., 66 S.W.2d 30, 31 (Ky. 1933).

[13] *Id.*

[14] *Id.*

[15] Moore v. Lackey Mining Co., 284 S.W. 415, 417 (Ky. 1926).

[16] Marlowe v. Marcum, 171 S.W.2d 997, 998 (Ky. 1943); *see* Carmichael v. Old Straight Creek Coal Corp., 22 S.W.2d 572, 575 (Ky. 1929).

temporary injuries.[17] When the injury is permanent, the recovery is the difference in the fair market value before and after the trespass.[18] On the other hand, when the injury is temporary, in that it can be abated at any time with no lasting adverse effect on the property, the measure of damages is "[t]he depreciation in rental value of the land during the period of occupancy if it is rented out, but if occupied by the owner it is the diminution in the value of the use of the property."[19] This latter standard is the correct measure of damages for a haulage trespass since the resulting injury is limited to an unauthorized use which can end at any time. Although this standard has been used for over fifty years,[20] Kentucky's highest court has vacillated on the issue of whether wheelage falls within the criterion.

On two occasions prior to 1967, the then Kentucky Court of Appeals affirmed the use of wheelage rates as the measure of damages for unauthorized surface use. The first was *Cary-Glendon Coal Co. v. Carmichael*,[21] where the Court approved damages based on a wheelage rate of one and one-half cent per ton for 462,265 tons of coal mined on adjacent land and transported over the plaintiff's property.[22] Then, in *Buchanan Coal Co. v. Mainis*,[23] where the lease at issue specifically permitted the defendant to haul coal taken from adjacent land across the surface of the leased premises,[24] the court affirmed a trial court award of two cents per ton for the use of "the Napier Tract in the transporting of coal purchased and taken from other lands not ajoining or adjacent to the Napier Tract."[25]

In 1967, in *Kentucky Mountain Coal Co. v. Hacker*,[26] the court held that although *Cary-Glendon*[27] set out the proper measure of damages, it was overruled to the extent that it used

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[17] *See* Price Bros. v. City of Dawson Springs, 227 S.W. 470, 472 (Ky. 1921).

[18] *See id.*

[19] Cary-Glendon Coal Co. v. Carmichael, 80 S.W.2d 29, 30 (Ky. 1935), *rev'd*, 412 S.W.2d 581 (1967) (on other grounds).

[20] *Price Bros.*, 227 S.W. 470.

[21] 80 S.W.2d 29, *rev'd*, 412 S.W.2d 581 (1967).

[22] *Id.* at 31.

[23] 245 S.W.2d 921 (Ky. 1952).

[24] *Id.* at 924; Brief for Appellant at 18, *Buchanan Coal*, 245 S.W.2d 921.

[25] *Buchanan*, 245 S.W.2d at 921.

[26] 412 S.W.2d at 581.

wheelage as the basis for recovery.[28] The trial court in *Hacker* had awarded two cents per ton for 181,297 tons of coal shown to have been hauled over the plaintiff's property.[29] In setting this award aside, the opinion simply stated that "[a]lthough two cents per ton may have been customary by private contract, this is not the established measure of damages for this character of injury to real property."[30] Later cases have reiterated the position in *Hacker* that wheelage is not the proper measure of damage for trespass; however, no further explanation for the exclusion has been given in these opinions.[31]

A. The Diminution in Use Value

The keys to assessing the validity of excluding wheelage lie in determining how the court has defined the bifurcated standard used for temporary damages and what damages have been awarded under it. Despite the lack of any apparent meaning for the phrase "diminution in the value of use" or any indication of how it might differ from rental value, no judicial definition can be found in the haulage trespass caselaw.[32] Other decisions, however, do offer insight into the meaning of the term, which forms the basis for recovery in all trespass actions. Foremost among these cases is *Adams Construction Co. v. Bentley*,[33] a 1960 decision in which the former Kentucky Court of Appeals candidly conceded, "[p]rior decisions of this court furnish little or no clue as to how the 'value of use' of property is to be measured."[34] The court then rectified this prior omission by making reference to decisions of other jurisdictions, concluding that use value is also generally measured by rental value.[35] While admitting that "the origin of the distinction [between property

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[27] 80 S.W.2d at 29, *rev'd*, 412 S.W.2d 581 (1967).

[28] *Hacker*, 412 S.W.2d at 583.

[29] *Id.* at 582.

[30] *Id.*

[31] *See Middle States Coal Co.*, 608 S.W.2d at 57; *Triple Elkhorn*, 646 S.W.2d at 726.

[32] For example, Texaco v. Melton, 463 S.W.2d 301, 307 (Ky. 1971), implied that the terms were defined differently, but made no effort to actually define them.

[33] 335 S.W.2d 912 (Ky. 1960).

[34] *Id.* at 914.

[35] *Id.*

which is rented out and that which is not] is obscure,"[36] the court went on to state that use value can be broader than rental value in that use value may permit recovery of the cost of renting equivalent property when the subject property, on which the trespass was committed, has no rental value.[37] Holding that "there must be introduced in evidence some tangible figure from which the value of the use reasonably can be deduced,"[38] the court ordered a new trial on the issue of damages because no evidence was offered as to "rental value of the dwelling in question or as to the rental value of other comparable property."[39]

Additional light is shed on the meaning of the diminution in use standard by *Wheeler v. Tackett*.[40] In that case, the plaintiff had procured a court ordered easement by necessity over the defendant's property, but for sixteen months thereafter, while appealing the order, the defendant obstructed the plaintiff's use of the passageway.[41] In a subsequent action for trespass, in applying the "diminution in use" standard, the jury awarded damages in excess of what testimony set as the difference in rental value of the plaintiff's property with and without the easement.[42] On appeal, the court stated that "the 'value of the use' of property, as the concept is understood in this jurisdiction, is not susceptible of precise measurement, but rental value is a highly relevant factor."[43] Although the court then noted that the jury award was greater than the diminution in rental value, it concluded that the difference was not so great as to be excessive, reasoning that "the great hardship" imposed by the trespass, which here consisted of the plaintiff having to walk to the nearest public road, rather than ride to it, could properly add to the rental value figure when calculating the "value of use."[44]

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Adams Constr. Co.*, 335 S.W.2d at 914-15.

[40] 339 S.W.2d 646 (Ky. 1960).

[41] *Id.* at 648.

[42] *Id.* at 649 (Evidence introduced at the trial established that the rental value of the property with the easement was $200 to $400 and 0 to $100 without it. The jury awarded $600.).

[43] *Id.*

[44] *Id.*; *see also* Byerly Motors v. Phillips Petroleum Co., 346 S.W.2d 762 (Ky. 1961) (awarding rental value for trespass).

B. Rental Value and Wheelage

The thrust of these cases is that rental value is the general basis for calculating the measure of temporary damages in trespass, regardless of the actual rental status of the property. Consequently, the issue becomes whether wheelage falls within the meaning of rental value. Although no Kentucky case was found on point, other jurisdictions have given rental value the ordinary meaning of the value of rent that would be paid for the property.[45] Rent has been defined as "consideration paid for the use of land."[46] Because wheelage is a form of consideration paid for the use of land, it is difficult to hypothesize why the Kentucky Supreme Court will not consider wheelage in determining rental or use value. Two possible theories can be advanced: first, although it is a form of rent, wheelage is inappropriate as a measure of damages in trespass; or second, wheelage simply may not be rent.

1. Wheelage as a Measure of Damages for Trespass

The issue here is whether damages for trespass should be measured by wheelage, which is based on the tonnage of coal carried across the land. Is the connection too tenuous? Would wheelage use allow the landowner to recover the trespasser's profits rather than the use value of the property? These potential problems emanate from basing the recovery on the specific acts of the trespasser. The two cases which dealt with whether rent or rental value should be measured in this manner reached conflicting conclusions. However, comparison of these cases will reconcile the holdings and provide the answer to the questions presented.

In *Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co.*,[47] the Montana Supreme Court held that evidence as to the amount of gas and other products sold by the defendant trespasser was inadmissible in determining rental value for the property.[48] In *Pritchard*, the trespass was committed on property

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[45] Bourdieu v. Seaboard Oil Corp., 146 P.2d 256, 259 (Cal. 1944).

[46] Saulsberry v. Saulsberry, 172 S.W. 932 (Ky. 1915).

[47] 190 P.2d 55 (Mont. 1947).

[48] *Id.* at 59.

developed by the plaintiff as a filling station, which ceased to be used as such in 1934.[49] The defendant, Farmer's Co-op Oil, occupied the land under a quitclaim deed in 1935, and again used it as a filling station.[50] In the subsequent suit for use and occupation, the plaintiff sought one cent for each gallon of gas, oil and grease which the defendant sold during its unlawful use of the premises.[51] In rejecting the plaintiff's theory, the court stated that rental value "implied a fixed trespasser's amount," which should not be varied according to the trespasser's business diligence or success.[52]

This factual situation contrasts sharply with the facts in *DeCamp v. Bullard*,[53] where the Court of Appeals of New York sustained a jury award of damages for use based on tollage, the customary compensation paid for moving logs down a river.[54] In *DeCamp*, the plaintiff had obtained a restraining order to stop the defendant from using a river on the plaintiff's property to transport logs from an upstream timber cutting operation. However, the trial court suspended the order so as to permit the defendant to use the river to move timber previously cut, on the condition that the defendant company would pay five thousand dollars to the court to cover any damages.[55] In a later trial to determine those damages, the jury was instructed to give the plaintiff compensation for the use of the river.[56] The jury was permitted to hear testimony that use of the river was worth two cents per mile per 1000 feet of logs.[57] The defendant appealed both the instruction and award of five hundred dollars for the use of the river.[58]

After expressing doubt as to the trial court's authority to sanction the trespass, even with indemnification, the court affirmed both the instruction and the award.[59] The court reasoned

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[49] *Id.* at 57.
[50] *Id.* at 58.
[51] *Id.* at 57.
[52] *Id.* at 59.
[53] 54 N.E. 26 (N.Y. 1899).
[54] *Id.* at 27.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *DeCamp*, 54 N.E. at 27.

that the order required the defendant to indemnify any and all damages, and held that in the case of deliberate trespass, damages included "damages in the nature of compensation for the value of the use . . . " or "[w]hatever the plaintiff might have received from . . . renting of the property."[60] The court then held that the customary tollage rate was the proper measure of rental value in this case.[61]

In comparing the two cases, one fundamental difference becomes apparent. In *Pritchard*, the defendant had continuously occupied a city lot that had a readily ascertainable fixed rental value, which became evident when the trial court excluded testimony as to the number of gallons of gas sold. This prompted the president of the plaintiff corporation to place rental value at one hundred dollars per month.[62] Undoubtedly, if the land had been used as a residence, the plaintiff would have originally sought the one hundred dollars per month as compensation for its use. That it prayed for damages based on the products sold by the defendant under the guise of rental value is evidence of the plantiff's effort to procure a percentage of the defendant's profits. Any reference to profits in measuring damage for trespass is impermissible.[63] The focus is always on the loss sustained by the plaintiff.[64] Thus the court in *Pritchard* properly refused to consider the defendant's profits in calculating rental value.

Although the Montana Court reached the right result in *Pritchard*, its statement that rent implies a fixed amount is troubling.[65] Even if rent is nearly always set at a certain amount due periodically, use of a road in a mining area and use of a river to float logs are two prime examples of property use for which compensation is not customarily set at a fixed monthly or weekly rate.[66] Given this, in *DeCamp*, the plaintiff sought and was awarded tollage, the customary compensation he would have received for use of the river under any private contract.[67]

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[60] *Id.* at 28.
[61] *Id.*
[62] *Pritchard*, 190 P.2d at 59.
[63] Whitwham v. Westminster Brymbo Coal and Coke Co., 2 Ch. 538, 542 (1896).
[64] *Id.*
[65] *Pritchard*, 190 P.2d at 59.
[66] *See DeCamp*, 54 N.E. at 27; *Hacker*, 412 S.W.2d at 582.
[67] *DeCamp*, 54 N.E. at 28.

Thus, at least as to the method used for calculating use value, the plaintiff in *DeCamp* did no better or worse in court than he would have done in any private negotiations. In other words, he did not procure any impermissible profit from the award.

A more subtle, but equally important, difference can also distinguish the cases. In *Pritchard*, the injury sustained by the trespass was unrelated to the business transactions of the trespasser, because its occupation of the land continued without regard to the precise number of gallons of gas it sold.[68] On the other hand, the scope of the intrusion on the landowner in *DeCamp* was directly related to the number of logs the defendant floated down the plaintiff's river.[69] The same is true in an action for unauthorized haulage. Each time the land is entered and the surface is used constitutes a distinct trespass,[70] and dependant upon the maximum number of tons of coal each truck can haul, tonnage does bear a relationship to the extent of the injury caused by the trespass. Thus, given the unique character of the haulage trespass, the use of wheelage to measure damages resulting therefrom is proper because it does reflect both the extent of the use of the land and the customary rate paid for such use.[71]

2. Wheelage as a Collateral Contract

The second possible objection to the use of wheelage as a measure of damages for a haulage trespass is that it is not rent, and thus, not a proper basis for the award. In light of the definition of rent as compensation for use, this seems to be an even more tenuous argument. Nevertheless, dicta found in *Edwards v. Lee's Adm'r*[72] does allude to a distinction in contracts regarding land. The relevant passage states that "rental value ordinarily indicates the amount of profit realized directly from the land as land, aside from all collateral contracts."[73] Unfortunately, after setting forth this proposition, the former Kentucky Court of Appeals made no effort to distinguish the two

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[68] *Pritchard*, 190 P.2d at 57.

[69] *DeCamp*, 54 N.E. at 28.

[70] Edwards v. Lee's Adm'r, 96 S.W.2d 1028, 1030 (Ky. 1936).

[71] *Saulsberry*, 172 S.W. at 932.

[72] 96 S.W.2d at 1028.

[73] *Id.* at 1031.

terms, but did seem to include wheelage in the former category.[74] In its discussion of wheelage cases, in both England and pre-*Hacker*[75] Kentucky (which permitted recovery of wheelage), the court stated that rental value was being used by both to measure the "profits" derived by the trespasser directly from the use of the land itself.[76]

Accepting arguendo that a wheelage agreement is a "collateral contract" rather than a rental agreement, if the focus is shifted to the purpose of the award, rather than the means typically used to measure it, wheelage still forms the basis of the recovery. According to *Byerly Motors v. Phillips Petroleum*,[77] trespass damages are "essentially [to compensate] for deprivation of the use and enjoyment of the premises."[78] In light of this purpose, wheelage is the proper measure of damages because it parallels the precise deprivation for which the landowner is being compensated.[79]

Other jurisdictions, focusing on compensation rather than the label given such payment, have used wheelage as a measure of damages. The best example of this is found in the English way-leave cases.[80] The way-leave cases are based on the proposition that "if one person has without leave of another been using the other's land for his own purposes, he ought to pay for such user."[81] The name is derived from the court's reliance on the customary rate paid for such use in determining the damages. *Whitwham v. Westminster Brymbo Coal and Coke Co.*[82] is typical of these cases. There, the defendants had hauled refuse from their colliery or coal mine onto the plaintiff's land for a period of eight years. Although admitting the trespass, the

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[74] *Id.*

[75] *Id.* at 1030 (citing to Carmichael v. Old Straight Coal Corp., 22 S.W.2d 572 (Ky. 1929)).

[76] *Id.* at 1030-31.

[77] 346 S.W.2d 762 (Ky. 1961).

[78] *Id.* at 765.

[79] *See* WOODWARD, THE LAW OF QUASI CONTRACTS 443 (1913). "[E]verytime [the trespasser] used the road, whether such use interfere[d] with the [landowner's] active employment of it or not, he temporarily deprive[d] the [landowner] of his 'exclusive use'. . . ." *Id.*

[80] *See, e.g.*, Quality Excelsior Coal Co. v. Reeves, 177 S.W.2d 728, 732 (Ark. 1944).

[81] *Whitwham*, 2 Ch. at 541-42.

[82] *Id.* at 538.

defendants contended that the plaintiff's recovery should be limited to damage to the property, which was substantial, because the practice had left the land "valueless" except for tipping purposes.[83]

In affirming a lower court's holding that the defendants must pay for both using and permanently injuring the property, the court emphasized that the award was consistent with the rule that "any benefit which accrues to the defendant is not an element" to be considered in a trespass action.[84] In summarizing both the theory behind the award of damages and the use of the customary amount paid per ton in measuring it, Lord Justice Rigley stated:

> The principle is that a trespasser shall not be allowed to make use of another person's land without in some way compensating that other person for that user. Where the trespass consists in using a way over the plaintiff's land a convenient way of assessing damages may be by an inquiry as to way-leave, which, when there is a customary rate of charge for way-leave in the locality, may furnish a convenient measure of damages. . . .[85]

This common sense approach to the problem, which recognized the absence of other practical alternative means to measure use value for this peculiar trespass, is remarkable for it candor. The Arkansas Supreme Court found it persuasive as well, and in *Quality Excelsior Coal Co. v. Reeves*[86] followed the English precedent by calculating damages for unlawful haulage based on the customary price paid under a private contract.[87] In its discussion of the issue, the Arkansas court cited both *Corpus Juris* (which stated the proper measure of damages for continuing trespass as "the worth of the use of the property"[88]) and the English cases (discussed *supra*), and concluded that " 'way-leave' is the expression used in England, and 'haulage royalty' is the expression used in Arkansas, but both expressions mean the

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[83] *Id.* at 538-39.
[84] *Id.* at 542.
[85] *Id.* at 543.
[86] 177 S.W.2d 728 (Ark. 1944).
[87] *Id.* at 732.
[88] *Id.*

same."[89] The court then affirmed both the method of calculating damages based on the haulage royalty (wheelage), and the rate the Chancellor applied, which was one and one-half cents per ton.[90]

C. *Discussion*

While a Kentucky landowner whose property has been used for unauthorized haulage can maintain an action in trespass,[91] his concomitant right to recover for deprivation of use and enjoyment caused by such a trespass is purely illusory. This stems from the Catch-22 position in which existing law places the landowner: he must offer evidence of use value in order to receive commensurate compensation,[92] but the most relevant use value available—wheelage—is not recognized by the Kentucky Supreme Court as a measure of damages.[93]

Although previously cited caselaw demonstrates that other jurisdictions determine damages based on wheelage,[94] the focus of this note has been on Kentucky law. The primary question posed is whether excluding evidence on wheelage is valid under the existing standard for recovery in trespass.[95] The conclusion reached is that it is not, because *Adams Construction*, *Wheeler*, and *Byerly Motors* demonstrate that rental value forms the general basis of recovery for temporary damages in trespass, regardless of the rental status of the property.[96] Consequently, the only valid reason for excluding this information is because it does not accurately measure the compensation which would be paid for the use of the particular property. Clearly this would not bar evidence of wheelage rates, since, as Kentucky's highest court has repeatedly acknowledged, those rates are the customary method used to fix compensation for use of private roadways for haulage purposes.[97] Thus they do offer an accurate estimate of the use value of the property.

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[89] *Id.*

[90] *Id.*

[91] Marlowe v. Marcum, 171 S.W.2d 997, 999 (Ky. 1943).

[92] *Adams Construction Co.*, 335 S.W.2d at 914.

[93] *See Hacker*, 412 S.W.2d at 582-83; *Middle States Coal Co.*, 608 S.W.2d at 57; *Triple Elkhorn*, 646 S.W.2d at 726.

[94] *See supra* notes 80-90 and accompanying text.

[95] *See supra* notes 17-20 and accompanying text.

[96] *See supra* notes 33-44 and accompanying text.

[97] *See Hacker*, 412 S.W.2d at 582-83; *Middle States Coal Co.*, 608 S.W.2d at 57.

The preceding argument is based on the assumption that Kentucky will equate wheelage with rent. However, if faced with that precise issue, the Kentucky Supreme Court might determine, as the Montana Supreme Court has,[98] that wheelage is not rent because rent implies a fixed amount of compensation.[99] This result seems unlikely given the opinion of *Saulsberry v. Saulsberry*.[100] There, faced with interpreting a will provision giving an individual a percentage of rent, Kentucky's highest court concluded that rent could be defined to include royalty payments for coal being mined on the property.[101] Because royalty payments and wheelage are both set at a fixed amount per ton, the variable nature of the compensation due under a wheelage agreement should not prevent its characterization as rent.

Should it distinguish *Saulsberry*, however, the court could still use wheelage as the measure of damage for a haulage trespass, because the purpose of the award of temporary damages is to compensate for deprivation of use and enjoyment.[102] Since wheelage is the customary payment a landowner is willing to accept for a voluntary deprivation of his exclusive right to use his or her property, it is the proper basis for determining the award. If the court should determine that wheelage is not technically rent, it could rely on *Adams Construction*[103] and *Wheeler*,[104] which indicate that "value of use" is a fluid concept[105] that can be broader than just rental value.[106] To do otherwise would exalt form over substance.

Aside from fairly compensating the victim, using wheelage as the measure of damages would serve another important function. Since it is the customary rate of compensation, the effect of the court's refusal to require the trespasser to pay wheelage would place "a premium on trespassing, because it makes the position of the trespasser more favorable than that of one law-

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[98] *See Pritchard*, 190 P.2d at 55.

[99] *Id.* at 59.

[100] 172 S.W. at 932.

[101] *Id.* at 933.

[102] *See Byerly Motors*, 346 S.W.2d at 765.

[103] 335 S.W.2d at 912.

[104] 339 S.W.2d at 646-49.

[105] *Id.* at 649. ("[t]he 'value of the use' of property, as the concept is understood in this jurisdiction, is not susceptible of precise measurement. . . .").

[106] *Id.* (citing *Adams Construction*, 335 S.W.2d at 914).

fully contracting."[107] From a solely institutional perspective, then, the rule should be changed, because legal sanctions should operate to deter non-compliance with the law, rather than promote it. The right of the landowner to recover "fair value"[108] for the use of his land can be realized and the integrity of the legal system can be bolstered if the Kentucky Supreme Court once again[109] would recognize wheelage as the basis for calculating the measure of damages for the trespass resulting from the transportation of coal or other minerals.

II. UNJUST ENRICHMENT

Unjust enrichment, also called assumpsit,[110] quasi-contract, restitution and contract implied at law, represents a second theory upon which a landowner may recover wheelage for the unauthorized use of his or her roadways. The cause of action was first generalized in 1760 in the English case of *Moses v. Macferlan*,[111] where Lord Mansfield stated: "[i]f the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract, (*quasi ex contracta*, as the Roman Law expresses it)."[112]

Subsequent decisions have become more precise on the issue of when to permit recovery based on unjust enrichment. Specifically, in the case of a trespass, it has been stated that when one commits a wrong or tort, "with the intention of benefitting his own estate, the law will . . . imply or presume a contract on the

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[107] *DeCamp*, 54 N.E. at 28.

[108] The phrase quoted is from a jury instruction found in *Texaco*, 463 S.W.2d at 309. The entire instruction reads:

> If you believe from the evidence that the defendant unreasonably interfered with plaintiffs' use of the surface of their land temporarily you will award plaintiffs such sum as you believe from the evidence will compensate plaintiffs for the fair value of the loss of use thereof for the period or periods of such interference.

Id.

[109] *See supra* notes 20-24 and accompanying text.

[110] Assumpsit is the term used in English law for an implied contract based on unjust enrichment. *See generally* Moses v. Macferlan, 97 ENG. REP. 676 (K.B. 1760).

[111] *Id.*

[112] *Id.* at 678.

part of the wrongdoer to pay the party injured the full value of all benefits resulting to such wrongdoer."[113]

Thus, in an action for unjust enrichment, recovery is based on the benefit accruing to the wrongdoer, rather than the injury suffered by the landowner. Obviously, there must be a benefit to the tortfeasor. When there is injury but no benefit, as for instance where cattle inadvertantly enter a neighbor's land damaging growing crops, no action for unjust enrichment will lie.[114] However, once a court determines that the wrongdoer has received a benefit "under such circumstances that in equity and in good conscience he [should] not retain it,"[115] the obligation to compensate for the benefit arises from the operation of law "without regard to the assent of the parties."[116] Indeed, the obligation will be implied where a party lacks capacity to assent,[117] or more typically, where the tortfeasor has specifically intended to procure the benefit without entering into a contract.[118]

A. Wheelage as Compensation for the Benefit Derived from Trespass

Applying these general principles to the unauthorized use of private roadways, unjust enrichment would seem to be available to the landowner, for the trespasser has received the benefit of having been able to move the coal without having to pay the usual contract fee for such a privilege. The second element would also be met because it would be unequitable or unfair to permit retention of the benefit procured by committing a trespass.[119] Further, Kentucky has precedent embodying these principles, which, if followed, would permit recovery of wheelage in an

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[113] Missouri Pac. Ry. Co. v. Atchison, 23 P. 610 (Kan. 1890) (citing Fanson v. Linsley, 20 Kan. 235).

[114] Roberts v. Moss, 106 S.W. 297, 299 (Ky. 1907) (an example presented in dicta).

[115] Kellum v. Browning's Adm'r, 21 S.W.2d 459, 465 (Ky. 1929).

[116] *Id.*

[117] Rhodes v. Rhodes, 44 Ch.D. 94, 105 (1890).

[118] Cablevision of Breckenridge v. Tannhauser Condominium Ass'n, 649 P.2d 1093 (Col. 1982) (awarding the plaintiff-cable company the usual subscription cost of cable service from a condominium association which successfully intercepted the cable signals without paying for them).

[119] *See id.*

action based on unjust enrichment. The case, *Edwards v. Lee's Adm'r*[120] involved somewhat unusual circumstances. The defendant there had conducted tours, without the plaintiff's permission, through a cave which was partially located under the plaintiff's property.[121] Although the only entrance to the cave was located on the defendant's land, the former Kentucky Court of Appeals noted that "a wrongdoer shall not be permitted to make a profit from his own wrong." The court awarded the plaintiff a share of the net profits derived from showing the cave equal in amount to the proportion of the cave underlying his property.[122]

Although factually different, the trespass in *Edwards* is analogous to a haulage trespass, for in both instances the landowners have a right to the exclusive use and enjoyment of their property. Also, both trespassers have benefitted from their use of the land, in violation of that right. Yet despite these similarities, in *Triple Elkhorn Mining Co. v. Anderson*[123] the Kentucky Supreme Court refused to allow evidence of wheelage rates under what it described as the *Edwards*' exception.[124] In support of this decision, which dissolved a lower court order compelling discovery of wheelage rates that the defendant mining company had paid in the past, the court noted that the opinion in *Edwards* had been declared "*sui generis* and peculiar on its facts, setting out that reasonable rental value was impossible to compute under the facts of that case."[125]

It is possible to read the opinion in *Triple Elkhorn* to mean that unjust enrichment is unavailable when damages for trespass can be assessed. This seems unlikely, however, since Kentucky has long recognized the right to waive a tort action and sue on an implied contract or unjust enrichment when the facts will sustain such a cause of action.[126] The more plausible interpretation is that the court will not rely on *Edwards* to extend unjust enrichment to other forms of trespass.

The second explanation is preferrable to the first since it does not absolutely foreclose recovery under unjust enrichment

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[120] 96 S.W.2d 1028 (Ky. 1936).
[121] *Id.* at 1028-29.
[122] *Id.* at 1032.
[123] 646 S.W.2d 725 (Ky. 1983).
[124] *Id.* at 726.
[125] *Id.*
[126] *Roberts*, 106 S.W. at 299.

for a haulage trespass. However, it does significantly complicate the task by creating several obstacles to achieving that recovery. Simply put, *Edwards* was a landmark decision because it was in contravention of two common law limitations on unjust enrichment as a cause of action. The flurry of notations which appeared in law journals discussing the "Great Cave Case" amply demonstrates this point.[127] Without *Edwards* these limitations must again be dealt with because both are implicated in a haulage trespass. The first limitation is the nature of the benefit recoverable under unjust enrichment. According to English decisions, the benefit must represent a tangible increase to the tortfeasor's estate and not just a savings thereof.[128] The second limitation, dating back to the reign of George II, is that a landlord-tenant relationship must exist for an action in assumpsit for rent to lie.[129] Because of these two rules, a majority of jurisdictions today do not permit recovery based on unjust enrichment for the tortious use of land.[130] Of the two reasons, contemporary courts have more readily rejected the former, which is surprising since the latter emanates from purely historical reasons which have no current relevance.[131] But close scrutiny of each reveals that neither can form an adequate basis for the rejection of unjust enrichment in the case of the unauthorized use of land.

B. Nature of the Benefit

The leading English case rejecting recovery based on assumpsit or unjust enrichment for unauthorized haulage is *Phillips v. Homfray*.[132] The case was actually before the court on two separate occasions. First, in 1871, the court determined that the plaintiff landowner was entitled to way-leave as damages for the trespass committed by the defendants through their unau-

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[127] *Recent Cases*, 31 Ill. L. Rev. 661, 680 (1937); *Recent Cases*, 2 Mo. L. Rev. 92, 115 (1937); *Recent Decisions*, 37 Col. L. Rev. 477, 503 (1937); *Recent Decisions*, 35 Mich. L. Rev. 1164, 1190 (1937).

[128] *See, e.g.*, Phillips v. Homfray, 24 Ch. D. 439, 463 (1883).

[129] *See generally* Ames, *Assumpsit for Use and Occupation*, 2 Harv. L. Rev. 377 (1889).

[130] *See* 1 *Palmer*, The Law of Restitution 74-75 (1978); *Woodward*, The Law of Quasi Contracts 456 (1913).

[131] *See Woodard*, *supra* note 118, at 456.

[132] 24 Ch. D. at 439.

thorized use of roads and underground passages to haul coal from adjoining property.[133] After the action was commenced, but before final judgement was entered, one of the tortfeasors died.[134] Thus the issue on the second appeal was whether the cause of action survived the tortfeasor's death.[135]

Over a century earlier, in the case of *Hambly v. Trott*,[136] Lord Mansfield had set forth the general rule establishing when a tort action survived a tortfeasor's death:

> So far as the tort itself goes, an executor shall not be liable, and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor shall be charged.[137]

In *Homfray*, a majority of the court interpreted the benefit for which assumpsit would lie, and thus survive the death of the wrongdoer, as limited to "the proceeds or value of actual property acquired wrongfully by the testator. . . ."[138] Thus "the mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor."[139] In light of the narrow reading of benefit, the unauthorized use of the property, which merely saved the tortfeasor in *Homfray* from paying the usual way-leave charge, was held to be actionable under trespass but not under an implied contract.[140] As the majority concluded, the deceased defendant had taken nothing from the plaintiff nor had his own assets "been necessarily swollen" by his carrying coal over the plaintiff's road.[141] "He

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[133] Phillips v. Homfray, 6 L.R.-Ch. 770 (1871).

[134] *Homfray*, 24 Ch. D. at 441 states:

> It is of the essence of the rule that claims which are indeterminate in their character shall not be pursued against the estate of a person after his death. If the claim is one for unliquidated damages, and has not been perfected by judgment at the time of the death of the defendant the rule applies. . . .

Id. at 466.

[135] *Id.* at 466.

[136] 98 Eng. Rep. 1136 (K.B. 1776).

[137] *Id.* at 1139.

[138] *Homfray*, 24 Ch. D. at 458.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 462.

saved his estate expense, but he did not bring into it any additional property or value belonging to another person."[142]

In a spirited dissent, Lord Justice Baggalay challenged the majority's interpretation of *Hambly v. Trott* on three major points. First, as to the necessity of the plaintiff's loss, he stated that "a gain or acquisition to the wrongdoer by the work and labour of another does not necessarily, if it does at all, imply a diminution of the property of such other person."[143] Secondly, addressing the distinction between adding to an estate and merely saving from its depletion, he said:

> Speaking with much diffidence . . . I feel bound to say that I can not appreciate the reasons upon which it is insisted that although executors are bound to account for any accretions to the property of the testator derived directly from his wrongful act, they are not liable for the amount or value of any other benefit which may be derived by his estate from or by reason of such wrongful act.[144]

Finally, the dissent stated the proper rule should be that a court of equity ought to permit recovery based on an implied contract, even after the death of the wrongdoer, "if the wrongful act has resulted in any benefit capable of being measured pecuniarily."[145]

Considering the response of modern courts and commentaries to the assertions made in the dissent, it can be stated with certainty that Lord Justice Baggalay is not alone in his disapproval of the distinction made by the majority and the artifical restriction it places on the meaning of a benefit. Evidence of a broader view can be found in the Restatement of Restitution, which states: "[A person] confers a benefit not only where he adds to the property of another but also where he saves the other from expense or loss. The word 'benefit' therefore denotes any form of advantage."[146]

Several cases, citing the Restatement with approval, have permitted recovery based on unjust enrichment for an amount

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[142] *Id.* at 462-63.

[143] *Id.* at 471.

[144] *Homfray*, 24 Ch. D. at 476.

[145] *Id.*

[146] RESTATEMENT OF RESTITUTION § 1 comment b (1937).

saved by a tortfeaser through his or her wrongdoing. Foremost among these is *Raven Red Ash Coal Co. v. Ball*,[147] which after describing the dissent in *Homfray* as "irrestible,"[148] allowed recovery of customary wheelage rates for unlawful haulage, on the theory of assumpsit for use and occupation.[149] The decision is noteworthy on two points. The damages claimed by the plaintiff were limited to the " 'exlusion of use' "[150] for the periods when the coal was being illegally hauled over his property. The sole benefit accruing to the tortfeaser was the retention of compensation it would have paid for the privilege had it lawfully contracted with the landowner. In permitting the recovery, the Virginia Supreme Court reasoned "[a]s the gist of the action is to prevent the unjust enrichment of a wrongdoer from the illegal use of another's property, such wrongdoer should be held on an implied promise [for both direct and indirect benefits]."[151]

Other cases which define a savings as a benefit include *Phillips Petroleum v. Cowden*.[152] In that case the defendant oil company had used certain property without the owner's permission to conduct seismographic tests intended to determine the existence of oil on the land.[153] In the subsequent action for unjust enrichment, the Court of Appeals, applying Texas law, awarded the plaintiff the usual contract fee paid for the privilege of mineral exploration.[154] A final example can be found in *Cablevision of Breckenridge v. Tannhauser Condominium Ass'n*,[155] where a defendant who successfully intercepted cable signals from the plaintiff-company was held liable for the usual subscription price for the cable service.[156]

Thus, even without *Edwards*,[157] precedent exists, which logic would favor, for holding a savings resulting from the commission of a tort to be a sufficient benefit to support an action in

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[147] 39 S.E.2d 231 (Va. 1946).
[148] *Id.* at 237.
[149] *Id.*
[150] *Id.* at 233 (the court quotes from the plaintiff's brief).
[151] *Id.* at 237.
[152] 241 F.2d 586 (5th Cir. 1957).
[153] *Id.* at 592.
[154] *Id.* at 593.
[155] 649 P.2d at 1093.
[156] *Id.* at 1094.
[157] *Edwards*, 96 S.W.2d at 1028.

unjust enrichment, so long as the benefit can be measured pecuniarily.[158] Although in only a footnote, *Raven Red Ash* explicitly states that the right exercised by a tortfeasor "must be capable of being dealt with contractually" in order to ascertain a "value upon which a contract might be founded."[159] The cases cited here demonstrate that courts seem to implicitly follow the dissent in *Homfray* on this point.[160]

The third issue raised by *Homfray* is the necessity of a loss to the plaintiff-landowner. Keener, a recognized scholar and author of a treatise on the law of quasi-contracts,[161] took the position that to recover it must "appear that what has been added to the defendant's estate has been taken from the plaintiff's. That is to say, the facts must show, not only a plus but a minus quality."[162] Although not universally required,[163] judicial expression of this element can be found in older cases. Typical of these cases is *Olwell v. Nye & Nissen Co.*,[164] where the defendant, after expressly agreeing not to use an egg washing machine owned by the plaintiff, took the machine out of storage and used it for four years. In assessing the plaintiff's claim for the benefit derived from the tortious use of the machine, the Supreme Court of Washington stated it is "necessary to show that while the [defendant] benefited from the use of the egg washing machine, [the plaintiff] thereby incurred a loss."[165]

The decisions recognizing the need for a loss, however, have also followed the dissent in *Homfray* by finding that there is no requirement that a plaintiff's loss must equal a defendant's gain.[166] This can also be seen in *Olwell*, where the defendant asserted that the plaintiff had suffered no loss because the machine was supposed to be in storage during the time it was used. To support this contention it was shown that the defendant had used the machine three years before the plaintiff accidently

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[158] *See supra* notes 143-56.

[159] *Raven Red Ash*, 39 S.E.2d at 238, n.2.

[160] *Homfray*, 24 Ch. D. at 476.

[161] KEENER, A TREATISE ON THE LAW OF QUASI CONTRACTS (1893).

[162] *Id.* at 163; *see also* WOODWARD, *supra* note 130, at § 274.

[163] *Cablevision*, 649 P.2d at 1096-97 (listing the elements of an action based on unjust enrichment, which does not include a loss to the plaintiff).

[164] 173 P.2d 652 (Wash. 1946).

[165] *Id.* at 653.

[166] *Homfray*, 24 Ch. D. at 471-72.

learned of his actions.[167] In rejecting the defendant's argument, the court noted:

> The very essence of the nature of property is the right to its exclusive use. Without it no beneficial right remains. However plausible, the [defendant] cannot be heard to say that his wrongful invasion of the [plaintiff's] property right to exclusive use is not a loss compensable in law.[168]

The benefit derived from the unauthorized use of the roadways can be valued at customary wheelage rates. If Kentucky defines a benefit, as the Restatement of Restitution does, to include any form of advantage procured by the trespass, one obstacle to permitting the recovery of wheelage under unjust enrichment can be removed. In the event that Kentucky follows the older caselaw by requiring evidence of a loss to the plaintiff as well, this should not warrant a different result, since that burden can be sustained by showing the loss of the exclusive right to use the property during the commission of the tort. There remains the problem of the absence of a landlord-tenant relationship between the landowner and the trespasser.

C. *The Landlord-Tenant Requirement*

To understand the reason behind this requirement, it is necessary to take a brief excursion into English history, since there is no contemporary basis for the rule. Noting that unjust enrichment at least initially developed as a matter of common law, and thus was extended on a case by case basis,[169] the explanation begins with Wager of Law, a method of trial under early English law in an action for debt.[170] By Wager of Law the one sought to be charged asserted under oath that he did not owe the debt, and when the party could produce eleven others who testified that his oath was true, this acted as a defense to the action.[171]

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[167] *Olwell*, 173 P.2d at 653-54.

[168] *Id.* at 654; *see also* Marder v. Realty Constr. Co., 205 A.2d 744 (N.J. 1964) ("We do not understand the trial court's use of 'trespass' . . . to limit the plaintiff to an injury to the freehold, thereby excluding compensation for some benefit the defendant may have garnered by a wrongful act unattended by depreciation of the value of the strip.").

[169] KEENER, *supra* note 161, at 1-12.

[170] Ames, *supra* note 129.

[171] WOODWARD, *supra* note 130, at § 2.

Needless to say, merchants disliked the practice, and the courts responded relatively early by extending assumpsit for debt or *Indebitatus Assumpsit* for the price of goods when no debt could actually be shown.[172] Since Wager of Law was not permitted in an action to recover rent, the court did not act as quickly to extend assumpsit to rent.[173]

The landlord still had difficulties, however, in collecting his rent. For instance, if a landlord sued in *quantum meruit* and evidence showed a demise for a sum certain, this resulted in a nonsuit.[174] Also, if the landlord sued for a sum certain he had to prove an express promise to pay the sum at the time of the demise.[175] Parliament responded to this by passing *Statute II George II C.19 Sec. 14*,[176] which gave the landlord "the right to sue in *Assumpsit* as well as in Debt without proof of an independent express promise."[177] According to Ames, since this *Indebitatus Assumpsit* was statutory, the English Courts "could not without too palpable a usurpation, extend the count to cases not within the Act of Parliament."[178] Thus because the court had not recognized assumpsit for rent absent a landlord-tenant relationship prior to passage of the act and because it was reluctant to do so afterwards, the rule that developed and is still enforced today in most jurisdictions is that assumpsit for rent will not lie without a landlord-tenant relationship.[179]

One writer, upon reviewing the basis for the exclusion, has commented that "[i]t is a reproach to the administration of justice that many courts have adhered to tradition for no better reason than this."[180] A number of states, including Virginia and several Western states, have specifically rejected it and now permit an action in unjust enrichment for rent against a trespasser.[181] A few others have given damage in trespass a broad

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[172] AMES, *supra* note 129.

[173] *Id.* at 377.

[174] *Id.*

[175] *Id.* at 378.

[176] *Id.* at 379.

[177] *Id.* at 380.

[178] AMES, *supra* note 129, at 380.

[179] *Id.*

[180] PALMER, *supra* note 130, at 76 (hypothesizing that the rule has remained because courts have failed to consider its origins).

[181] *Cowden*, 241 F.2d at 592 (applying Texas law); *Raven Red Ash*, 39 S.E.2d at 233; *Atchison*, 23 P. at 611. Kentucky is not among these states if *Edwards* is excluded.

enough reading to include the benefit derived by the trespasser and not just the injury suffered by the landowner.[182] Many more states have stretched the landlord-tenant relationship to cover the tenant at sufferance.[183]

Why the landlord-tenant requirement remains at all is a mystery. Mandating a landlord-tenant relationship requires the defendant to be on the property with the landowner's permission in order for the owner to recover rent on an implied contract.[184] Thus if an entry is tortious at its inception, *i.e.* a trespass, the owner is incapable of recovering rent from the tortfeasor.[185] In England (as previously discussed), the landowner was still able to recover rent, including way-leave, under trespass.[186] This might explain the judicial reluctance to extend assumpsit beyond the statute, since, although assumpsit and trespass are not co-extensive, the landowner was still given some relief. In Kentucky, however, the effect, at least as to a haulage trespass, is to preclude the landowner from any recovery of customary wheelage which he or she would have received if the trespasser had legally contracted for the right to use the roads. Because the trespasser had undeniably benefitted through his or her tortious act, to bar recovery in unjust enrichment because of an antiquated defense and the political maneuvering between the King's Bench and Parliament in Eighteenth Century England is, as Palmer opined, a reproach to justice.[187] If the Kentucky Supreme Court were to consider the basis for the exclusion and its result, surely the rule would not stand.

D. Discussion

Although *Edwards v. Lee's Adm'r*[188] was a startling departure from the established law when it was announced in 1936,

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Indeed prior to *Edwards*, case law specifically required the landlord tenant relationship to recover rent on an implied contract. *See* Turnpike Road Co. v. Rogers, 70 Ky. (VII Bush) 532 (1870).

[182] *See Marder*, 205 A.2d at 745 (stating that recovery of a benefit derived from a trespass is permissible in an action for trespass).

[183] *See* City of Detroit v. Gleason, 74 N.W. 880 (Mich. 1889).

[184] *Raven Red Ash*, 39 S.E.2d at 235.

[185] *Id.* at 235-36; *see also* AMES, *supra* note 129, at 380.

[186] *See supra* notes 81-85 and accompanying text.

[187] PALMER, *supra* note 130, at 76.

[188] 96 S.W.2d 1028 (Ky. 1936).

many jurisdictions, either directly or indirectly, have come to embrace the principles found in the decision. In light of the arbitrary nature and effect of the English decision, the move towards *Edwards'* more equitable and logical interpretation of unjust enrichment is not surprising. What is inexplicable is the Kentucky Supreme Court's refusal to apply the holding in *Edwards* to other unauthorized use of property. The irony of the situation can be best understood when it is realized that in *Raven Red Ash*[189] the Virginia Supreme Court relied on the reasoning in *Edwards* to support its decision to permit the recovery of wheelage in an action based on unjust enrichment.[190]

Perhaps the most disturbing aspect of *Triple Elkhorn*[191] is the basis of the court's decision not to extend unjust enrichment to a haulage trespass, which was because rental value can be ascertained for surface use, when it could not be for the use of a cave.[192] This implies that extending unjust enrichment is unnecessary because the landowner has an adequate remedy in trespass. As the review of trespass cases in the preceeding section clearly established, although rental value (wheelage) is ascertainable for a haulage trespass, it is not the measure of damages currently used for trespass.[193] Thus *Triple Elkhorn* not only signals a total retreat from the promise of *Edwards* to afford the landowner recovery of the benefit conferred on the trespasser by his unauthorized use of land, but also represents an exercise in judicial sophistry as well.

The only consolation found in *Triple Elkhorn* is that the court did not use the case to specifically overrule *Edwards*, but merely limited it to its facts.[194] So long as *Edwards* retains any vitality, hope exists that the court will reconsider the issue and determine that equity demands that *Edwards* and not *Triple Elkhorn* define the availablility of unjust enrichment for a real property trespass. Perhaps an awareness of the movement in other jurisdictions towards a more liberal construction of the

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[189] *Raven Red Ash*, 39 S.E.2d at 231.

[190] *Id.* at 237-38.

[191] *Triple Elkhorn*, 646 S.W.2d at 725.

[192] *Id.* at 726.

[193] *See supra* notes 26-31 and accompanying text.

[194] *Triple Elkhorn*, 646 S.W.2d at 726.

requisite benefit[195] and a frank appraisal of the reasons behind the landlord-tenant requirement[196] will facilitate the return to *Edwards*.

CONCLUSION

The Kentucky Supreme Court has two avenues available for permitting the recovery of wheelage for a haulage trespass, with legal precedent to support each. Since trespass and unjust enrichment do not provide equal recovery under all circumstances,[197] the optimal solution would be for the court to recognize both and allow the landowner to choose which action to bring. Though somewhat unrealistic, the suggestion is not without merit, because the election is currently available for a trespass which has resulted in the removal of timber.[198] If the court will not recognize both, whether founded in the equity of the plaintiff's claim that the defendant has been unjustly enriched by his or her unauthorized use of the property or in the law of trespass, the court should award wheelage to the landowner whose legal right to exclusive use of his or her property has been violated by a haulage trespass.

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[195] *See supra* notes 137-56 and accompanying text.

[196] *See supra* notes 170-78 and accompanying text.

[197] For instance, in some jurisdictions (with some indication that Kentucky is among them), damages in trespass cannot exceed the value of the property involved. *See Olwell*, 173 P.2d at 654; *Middle States Coal Co.*, 608 S.W.2d at 57 (stating an award in trespass in excess of the value of the property was "excessive and clearly erroneous"). Thus in the case of an extended trespass, suit on an implied contract would offer a more adequate remedy, since its measure of damages is limited only by the benefit received by the wrongdoer. On the other hand, when the actions of a trespasser would warrant the imposition of punitive damages, they could be recovered under the trespass, but not under an implied contract. *Fordson Coal Co. v. Ky. River Coal Corp.*, 69 F.2d 131 (6th Cir. 1934) (applying Kentucky law).

[198] *Fordson Coal*, 69 F.2d at 132; Roberts v. Moss, 106 S.W. 297, 299 (Ky. 1907).